

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

GREAT BASIN RESOURCE WATCH; et al.,

Plaintiffs,

V.

UNITED STATES DEPARTMENT OF THE
INTERIOR; et al.,

Defendants,

EUREKA MOLY, LLC,

Defendant-Intervenor.

Case No. 3:19-cv-00661-LRH-CSD

ORDER

15 The present litigation follows a 2013 lawsuit in this district before U.S. District Court Judge
16 Robert C. Jones and an appeal to the Ninth Circuit Court of Appeals in which Great Basin Resource
17 Watch (“GBRW”) and Western Shoshone Defense Project (“WSDP”) challenged the Bureau of
18 Land Management’s (“BLM”) approval of the Mt. Hope Project.¹ As a result of that litigation,
19 Judge Jones vacated BLM’s record of decision regarding the Project and remanded to BLM. On
20 remand, BLM approved the Project a second time. Now joined by Progressive Leadership
21 Alliance of Nevada (“PLAN”), GBRW and WSDP challenge BLM’s second approval of the
22 Project. Before the Court are the plaintiffs’, defendants’, and defendant-intervenor’s motions for
23 summary judgment.² For the reasons explained below, the Court grants Plaintiffs’ motion in part
24 and denies it in part. Accordingly, the Court also grants in part and denies in part the Defendants’
25 motions.

¹ *Great Basin Res. Watch v. U.S. Dep’t of Interior*, No. 3:13-cv-00078-RCJ-VPC, 2014 WL 3696661 (D. Nev. 2014); *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016).

² ECF Nos. 57, 68, 69. In addition to the parties' briefing, American Exploration & Mining Association, submitted an amicus brief. ECF No. 73. And the parties filed supplemental briefing regarding relevant authorities. ECF Nos. 78, 85, 86, 89, 90. The Court has fully considered all briefing and addresses it as needed within this order.

1 **I. BACKGROUND**

2 **A. Factual Background**

3 The Project is an eighty-year mining operation located near Eureka, Nevada. AR06673–
 4 74. Eureka Moly, LLC (“EML”) intends to mine for molybdenite ore, which will produce
 5 recoverable molybdenum. AR066773. The Project will consist of “an 18- to 24- month
 6 construction phase, 44 years of mining and ore processing, 30 years of reclamation, and five years
 7 of post-closure monitoring.” AR066774. And it will span across 21,523 acres of both private and
 8 public land, causing surface disruption to 8,355 acres. *Id.* EML holds 14 patented claims on the
 9 private land and approximately 1,550 lode mining claims and mill site mining claims on the public
 10 land. *Id.* The Project will consist of an open pit mine and ancillary facilities. *Id.*

11 Throughout the Project, EML will use an open pit mining method and a flotation and
 12 roasting process to process the mined ore. AR066773. The estimated 966 million tons of
 13 molybdenite ore mined will produce approximately 1.1 billion pounds of recoverable molybdenum
 14 and approximately 1.7 billion tons of waste rock and 1 billion tons of tailings. AR066774. In
 15 addition, the Project will utilize dewatering in the open pit and will require ground water pumping
 16 in other areas. AR066364. These two actions will lower the water table in the vicinity of those
 17 facilities and will impact springs and streams. *Id.*; AR066365. BLM concluded that four of the
 18 springs within the Project area are considered PWR 107 springs. AR066364.

19 **B. Procedural Background**

20 In 2013, GBRW and WSDP sued BLM, challenging BLM’s approval of the Project.³ They
 21 alleged that BLM failed to protect lands withdrawn under Public Water Reserve 107 (“PWR 107”),
 22 violated the National Environmental Policy Act (“NEPA”), and violated the Federal Land Policy
 23 Management Act (“FLPMA”). *Great Basin Res. Watch*, 2014 WL 369661 at *2. In a summary
 24 judgment order, the district court found in favor of the defendants on all issues. *Id.* at 7–18.

25 On appeal, the Ninth Circuit held that BLM violated NEPA but declined to reach the PWR
 26 107 claim and the FLPMA claim, reasoning that BLM should be given an opportunity to correct
 27 the NEPA violations “before challenges to the approval of the Project itself are entertained.” *Great*

28 ³ PLAN was not a party in the first case.

1 *Basin*, 844 F.3d at 1101–11, 1111 n.10. Although the court did not reach the PWR 107 claim, it
 2 indicated that BLM should confirm whether four springs within the Project area are PWR 107
 3 springs. *Id.* at 1111.

4 On remand, the district court vacated the 2012 Record of Decision and remanded to the
 5 BLM. Subsequently, BLM issued a supplemental environmental impact statement, followed by a
 6 new record of decision in 2019. *See* AR066344; AR066770. The 2019 Record of Decision
 7 approved the Project. AR066772. Plaintiffs now challenge the 2019 Record of Decision, alleging
 8 BLM violated PWR 107 and related laws, NEPA, and the FLPMA.

9 **II. LEGAL STANDARD**

10 The Administrative Procedure Act governs judicial review of alleged violations of NEPA
 11 and the FLPMA, *Or. Nat'l Res. Council Fund v. Brong*, 492 F.3d 1120, 1124–25 (9th Cir. 2007),
 12 and requires a court to “hold unlawful and set aside agency action” if it is found to be “arbitrary,
 13 capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A).
 14 An agency’s action is considered “arbitrary and capricious” when

15 the agency has relied on factors which Congress has not intended it to consider,
 16 entirely failed to consider an important aspect of the problem, offered an
 17 explanation for its decision that runs counter to the evidence before the agency, or
 18 is so implausible that it could not be ascribed to a difference in view or the product
 19 of agency expertise.

20 *350 Mont. v. Haaland*, 29 F.4th 1158, 1168 (9th Cir. 2022) (quoting *Motor Vehicle Mfrs. Ass'n of*
 21 *U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). When reviewing agency
 22 action under this standard, a court “may not substitute [its] judgment for that of the agency,” and
 23 must limit its review to “the grounds that the agency invoked when it took the action.” *Ctr. for*
 24 *Biological Diversity v. U.S. Fish and Wildlife Serv.*, 33 F.4th 1202, 1216 (9th Cir. 2022) (internal
 25 quotations omitted). “This standard is highly deferential, presuming the agency action to be valid
 26 and affirming the agency action if a reasonable basis exists for its decision.” *Indep. Acceptance*
 27 *Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotation marks omitted).

28 **III. DISCUSSION**

29 Plaintiffs seek summary judgment on their PWR 107, NEPA, and FLPMA claims.
 30 Specifically, they argue that (1) BLM failed to protect water rights and withdrawn lands under

1 PWR 107; (2) BLM violated NEPA by failing to adequately analyze direct, indirect, and
 2 cumulative impacts, baseline conditions, and mitigation and related project impacts; and (3) BLM
 3 violated the FLPMA by failing to adequately prevent unnecessary or undue degradation of public
 4 resources and by failing to include the reclamation costs and financial assurances in the Record of
 5 Decision. The Court addresses each argument in turn.

6 **A. PWR 107**

7 Plaintiffs first assert that BLM failed to adequately protect federal water reserves that are
 8 located within the project area and thereby violated PWR 107 and related laws.

9 President Calvin Coolidge created PWR 107 by executive order in 1926 pursuant to his
 10 authority under the Pickett Act. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 966 (9th Cir.
 11 2006); *United States v. Idaho*, 959 P.2d 449, 451 (Idaho 1998). The executive order provided:

12 It is hereby ordered that every smallest legal subdivision of the public land surveys
 13 which is vacant unappropriated unreserved public land and contains a spring or
 14 water hole, and all land within one quarter of a mile of every spring or water hole
 15 located on unsurveyed public land be, and the same is hereby, withdrawn from
 settlement, location, sale, or entry, and reserved for public use in accordance with
 the provisions of Sec. 10 of the [Stock Raising Homestead Act of 1916 (“SRHA”)]
 and in aid of pending legislation.

16 *Hankins*, 456 F.3d at 966. This withdrawn land remained subject to the Pickett Act, which
 17 provided that “all lands withdrawn under the provisions of this Act shall at all times be open to
 18 exploration, discovery, occupation, and purchase, under the mining laws of the United States, so
 19 far as the same apply to metalliferous minerals.” Act of June 25, 1910, Pub. L. No. 3030, as
 20 amended by Act of August 24, 1912, Pub. L. No. 316, ch. 369.⁴ Thus, PWR 107 withdrew
 21 qualifying springs and land but held them open to exploration, discovery, occupation, and purchase
 22 for metalliferous minerals as permitted by the mining laws.

23 In the previous litigation, Plaintiffs raised a PWR 107 claim before the district court and
 24 the Ninth Circuit. The Ninth Circuit declined to address this claim, in part, because “the proper
 25 analysis of the PWR 107 claim turns in large part on whether” certain springs within the Project
 26 area are covered by PWR 107, but BLM’s position on that issue was unclear. *Great Basin*, 844

27 ⁴ The Pickett Act was later withdrawn in the FLPMA. Pub. L. 94-579, 905 Stat. 2744 (1976) (codified at 43 U.S.C.
 28 §§ 1701 *et seq.* (1986)). All withdrawals in force on the date of enactment remain in force until modified in accordance
 with the FLPMA or other applicable law. *Id.*

1 F.3d at 1111. On remand, the BLM examined several springs within the Project area and
 2 determined that four springs and their surrounding land are covered by PWR 107.⁵ AR066362.

3 Plaintiffs now allege that BLM failed to adequately protect the PWR 107 springs and
 4 surrounding land because it approved EML's proposal to permanently dump its waste rock on the
 5 land even though EML does not have a valid mining claim for those lands and the lands do not
 6 contain metalliferous minerals. In turn, Defendants argue that the Pickett Act's exception that
 7 withdrawn lands remain open for exploration and occupation for metalliferous minerals as
 8 permitted by the Mining Law applies, and that EML has a statutory right under the Mining Law to
 9 occupy and use open lands for its waste rock and tailings facilities. Notably, the parties agree that
 10 the four springs and the surrounding land qualify for PWR 107 protection, that molybdenite ore
 11 qualifies as a metalliferous mineral, and that no mining will occur on the land. The parties' main
 12 disagreement focuses on whether BLM can occupy the land that qualifies for PWR 107 protection
 13 by dumping waste rock on it. The Court agrees with Plaintiffs that BLM cannot do so.⁶

14 PWR 107 withdrew qualifying springs and their surrounding land "to prevent
 15 monopolization of water needed for domestic and stock watering purposes." *Hankins*, 456 F.3d
 16 at 966. They, however, remained open to occupation relating to metalliferous minerals as the
 17 mining laws permitted. Plaintiffs claim that to qualify for this exception to the PWR 107
 18 withdrawal, there must be valuable deposits of metalliferous minerals on the lands.

19 Although this exception, found in the Pickett Act, does not specifically mention the
 20 necessity of a valuable mineral deposit on the withdrawn land, Plaintiffs' claim is correct. The
 21 Pickett Act explicitly references the mining laws as what governs whether the lands remain open
 22 for occupation pertaining to metalliferous minerals, requiring the Court to look to the Mining Law
 23 of 1872. Section 22 of the Mining Law of 1872 states:

24
 25
 26⁵ BLM determined that the Garden Spring (Spring 597), an unnamed spring (Spring 604), the Mount Hope Spring
 27 (Spring 619), and the Lone Mountain Spring (Spring 742) are all PWR 107 springs. AR066362-63.

28⁶ The Court finds that the PWR 107 claim and all related arguments regarding the Mining Law and other relevant laws
 are properly before the Court. Although the district court in the first round of litigation found when addressing the
 PWR 107 claim that determining mining claim validity was unnecessary, Plaintiffs raised the PWR 107 claim on
 appeal. In addition, as explained below, the Ninth Circuit has issued a new binding opinion that addresses the
 prerequisites for occupying land under the Mining Law.

1 Except as otherwise provided, all valuable mineral deposits in lands belonging to
 2 the United States, both surveyed and unsurveyed, shall be free and open to
 3 exploration and purchase, and the lands in which they are found to occupation and
 4 purchase, by citizens of the United States ... under regulations prescribed by
 5 law

6 30 U.S.C. § 22.

7 In *Center for Biological Diversity v. United States Fish and Wildlife Service*, the Ninth
 8 Circuit recently explained that Section 22 has two clauses. 33 F.4th 1202, 1219 (2022) [hereinafter
 9 *Rosemont*]. The first clause requires that government lands “shall be ‘free and open to *exploration*
 10 and purchase’ of ‘valuable mineral deposits.’” *Id.* at 1219 (emphasis in original). The second
 11 clause “provides that government lands ‘in which they [i.e., valuable mineral deposits] are found’
 12 shall be free and open to ‘*occupation* and purchase.’” *Id.* (alteration and emphasis in original).
 13 “That is, the right of ‘*occupation*’ depends on valuable minerals having been ‘found’ on the land
 14 in question. If no valuable minerals have been found on the land, Section 22 gives no right of
 15 occupation beyond the temporary occupation inherent in exploration,” *id.* (citing 30 U.S.C. § 23,
 16 26), because “validity of a mining claim is a necessary prerequisite to post-exploration occupancy
 17 of a claim. A claim is valid only if valuable minerals have been found on the claim,” *id.* at 1217–
 18 18.

19 The Defendants attempt to distinguish this case from *Rosemont*, primarily arguing that
 20 *Rosemont* involved a different federal agency that has a different organic statute and regulations.⁷
 21 As both parties acknowledge, *Rosemont* involved the Forest Service rather than the BLM. *Id.* at
 22 1207. But this difference has no bearing here. When discussing Section 22, the court made no
 23 reference to Forest Service’s regulations but rather focused exclusively on the text of the statute.
 24 *Id.* at 1218–21. BLM offers, and the Court finds, no reason to depart from *Rosemont*’s
 25 interpretation of Section 22. Another court in this district recently reached the same conclusion.
 26 *Bartell Ranch LLC v. McCullough*, 3:21-cv-00080-MMD-CLB, 2023 WL 2226849, at *6–11 (D.
 27 Nev. Feb. 6, 2023) (applying *Rosemont*’s holding to a mining project authorized by BLM). Thus,

28 ⁷ Defendants attempt to distinguish this case from *Rosemont* also on the ground that the plaintiffs in *Rosemont* brought
 29 a claim challenging the agency’s compliance with the Mining Law itself. It is true that the Plaintiffs in this case do
 30 not raise a claim under the Mining Law, but the Court finds that PWR 107 and the Pickett Act require it to look to the
 31 Mining Law to determine to what extent EML may occupy the PWR 107 lands and what the prerequisites of that
 32 occupation are.

1 the Court finds that *Rosemont*'s interpretation of Section 22 is binding on this Court. *Rosemont*
 2 therefore requires a valid mining claim, which depends upon the discovery of a valuable mineral
 3 deposit of metalliferous minerals on the PWR 107 lands, for the Pickett Act exception to apply.

4 Like the defendant in *Rosemont*, BLM and EML argue that Section 22 permits EML to
 5 occupy the PWR 107 land with waste rock during that period because the occupancy will not be
 6 permanent. In *Rosemont*, the Forest Agency—in a near identical argument to BLM's—argued
 7 that occupation would not be permanent because *Rosemont* would not have authorization to
 8 occupy the lands after mining ends and reclamation is completed. "Certainly," the Forest Agency
 9 acknowledged, "the lands will be changed, but that does not preclude other meaningful uses after
 10 mining reclamation." *Id.* The Ninth Circuit found that the Forest Agency's argument "does
 11 violence to the English language." *Id.* at 1221. *Rosemont* proposed to bury thousands of acres of
 12 National Forest land beneath a 700-foot-deep layer of waste rock. *Id.* "Under any ordinary
 13 definition, the layer of waste rock will 'occupy' the land on which it sits, and will do so
 14 permanently. No person or structure will ever again touch the surface of that land." *Id.*

15 The Court finds no meaningful difference between the Forest Agency's argument in
 16 *Rosemont* and BLM's argument here. EML seeks to dump its waste rock on the PWR 107 lands
 17 and leave it there permanently. Although EML's authorization to use the land will expire when
 18 the Project is complete, the waste rock will remain. Thus, EML's occupation of the PWR 107
 19 lands will be permanent. *Rosemont* requires that to permanently occupy the land as EML proposes,
 20 valuable deposits of minerals must exist. Moreover, "discovery of valuable minerals is essential
 21 to the right to *any* occupancy—temporary or permanent—beyond the occupancy necessary for
 22 exploration." *Id.* at 1220.

23 Here, however, the record contains no evidence that the PWR 107 springs or surrounding
 24 lands contain molybdenite ore or any other metalliferous mineral. BLM admits that it made no
 25 attempt to determine whether EML's mining claims are valid. ECF No. 25 at 22 ¶143. And, as
 26 Plaintiffs point out, the fact that EML plans to use this land to dump its waste rock suggests that
 27 the land does not contain the requisite valuable mineral deposits. *Cf.* AR068712 (explaining that
 28 this land was chosen as the location for the waste rock in part because of an "absence of suitable

1 mining reserves underneath the waste rock disposal facilities”). On this record, the Court cannot
 2 conclude that the PWR 107 springs and lands within the Project area meet the prerequisite to
 3 occupation under the mining laws. And accordingly, the Court cannot conclude that the Pickett
 4 Act exception applies.

5 The defendants also attempt to rely on 30 U.S.C. § 612 to support the proposition that EML
 6 can use the PWR 107 lands for uses that are “reasonably incident” to mining the minerals in the
 7 pit. This argument is also foreclosed by *Rosemont*. See *Rosemont*, 33 F.4th at 1218 (“[N]either
 8 Section 612 nor the Mining Law provides Rosemont with the right to dump its waste rock on
 9 thousands of National Forest land on which it has no valid mining claims.”). “Section 612 of the
 10 Multiple Use Act does not authorize uses of mining claims beyond those authorized by the Mining
 11 Law. ... Section 612 ‘did not change the lands to which the Mining Law applied or specify where
 12 mining operations may or may not occur.’” *Id.* BLM cannot skirt the Mining Law requirement
 13 that valuable mineral deposits must be found in order to occupy the land by relying on Section
 14 612’s authorization of using the lands for uses reasonably incident to mining.

15 As explained above, the Court finds that the record does support the conclusion that the
 16 Pickett Act’s exception to the withdrawal of land under PWR 107 applies. Because BLM has not
 17 prepared any analysis regarding whether valuable mineral deposits exist on the PWR 107 lands,
 18 the Court finds that it is appropriate to remand to the agency so that it can conduct the proper
 19 analysis in the first instance. Because that analysis may affect BLM’s decision regarding the
 20 approval of the Project, the Court declines to reach Plaintiffs’ FLPMA claim as it relates to the
 21 PWR 107 lands and Plaintiffs’ arguments regarding the Stock Raising Homestead Act of 1916.

22 **B. NEPA**

23 Plaintiffs also challenge BLM’s approval of the Project under NEPA, alleging that
 24 (1) BLM failed to fully consider all direct, indirect, and cumulative impacts of the proposed action;
 25 (2) BLM failed to fully analyze the Mt. Hope Project’s baseline air quality conditions; and
 26 (3) BLM failed to adequately analyze mitigation and related project impacts.

27 NEPA, a procedural statute, requires “federal agencies to consider the environmental
 28 impact of any major federal action.” *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462

1 U.S. 87, 89 (1983). “NEPA itself does not mandate particular results, but simply prescribes the
 2 necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Its
 3 aim is to “ensure[] that the agency, in reaching its decision, will have available, and will carefully
 4 consider, detailed information concerning significant environmental impacts” and “that the
 5 relevant information will be made available to the larger audience that may also play a role in both
 6 the decisionmaking process and the implementation of that decision.” *WildEarth Guardians v.*
 7 *Mont. Snowmobile Ass’n*, 790 F.3d 920, 924 (9th Cir. 2015) (quotations omitted).

8 Included in NEPA is the requirement to prepare an environmental impact statement (“EIS”)
 9 “[f]or major federal actions significantly affecting the quality of the human environment.”
 10 *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004). To satisfy NEPA,
 11 the EIS must include “a thorough analysis of the potential environmental impacts that provides
 12 full and fair discussion of significant environmental impacts and informs decisionmakers and the
 13 public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance
 14 the quality of the human environment.” *Id.*

15 In the Ninth Circuit, a reviewing court employs a “rule of reason” standard when reviewing
 16 an EIS. *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (per curiam). This
 17 standard requires that “an EIS contain[] a reasonably thorough discussion of the significant aspects
 18 of the probable environmental consequences.” *Id.* In other words, the agency must take a “hard
 19 look” at the impacts of its action. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety*
 20 *Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008).

21 1. Baseline Values for Air Pollutants

22 Plaintiffs argue that BLM failed to adequately assess the baseline air quality conditions
 23 within the Project area. Specifically, Plaintiffs fault BLM for not obtaining site specific data and
 24 for its decision to set the baseline values for CO, NO₂, and SO₂ as zero.

25 This portion of BLM’s analysis was also challenged in the previous litigation. The Ninth
 26 Circuit affirmed BLM’s decision to rely on baseline values from other rural areas because no actual
 27 baseline values were available for the project area. *Great Basin*, 844 F.3d at 1102. But the court
 28 criticized BLM’s analysis regarding several pollutants because BLM insufficiently supported its

1 decision to use zero as a baseline value for those pollutants. *Id.* at 1103–04. BLM had relied on
 2 an email from a Nevada Department of Environmental Protection’s (“NDEP”) official that did not
 3 explain how or why NDEP arrived at its recommendation of using zero as the pollutants’ baseline
 4 value. *Id.* at 1103. Instead, with no further explanation or independent scrutinization of the
 5 estimate, BLM adopted the recommendation and used zero as the pollutants’ baseline value. *Id.*
 6 Finding that that the air impacts analysis was essentially immune from public scrutiny, the court
 7 concluded that BLM’s air impacts analysis was inadequate. *Id.* at 1104.

8 On remand, BLM did not obtain any site-specific data for the baseline values. BLM did,
 9 however, obtain additional explanation from the NDEP official for his recommendation that zero
 10 should be used for the baseline values for CO, NO₂, and SO₂. The NDEP official explained:

11 The determination of appropriate background concentrations is a complex issue
 12 especially in the remote areas of Nevada. First, ambient monitoring is sparse and
 13 seldom representative on large spatial scales. The [Bureau of Air Quality Planning]
 14 BAQP maintains a monitoring network for the State of Nevada; however, there are
 15 no monitors for these pollutants in remote areas. Second, human activities in the
 16 remote areas of Nevada are considered to be an insignificant influence to ambient
 17 air quality. To the extent that these pollutants are generated by anthropogenic
 18 activities, their background concentrations are not significantly different from zero
 19 when used for modeling purposes.

20 AR066415. Alternatively, he explained, background concentrations from representative sites can
 21 be obtained, taking into account terrain and microclimatic conditions. *Id.* Sites far away, such as
 22 those in adjacent states, can be used as representative states but caution should be exercised when
 23 looking at those because they may not be representative. *Id.* The NDEP official concluded by
 24 explaining that the BAQP has successfully used a zero-background concentration level (baseline
 25 value) for CO, NO₂, and SO₂ for air dispersion modeling in remote areas of Nevada for many
 26 years. *Id.*

27 In addition, Air Sciences, Inc. conducted supplemental analyses regarding the
 28 concentration levels and the cumulative air impacts, *see* AR070556–71, which was largely adopted
 by the BLM in the 2019 Final Supplemental Environmental Impact Statement (“FSEIS”), *see*
 AR066373–84. These analyses reached the same conclusion as the NDEP official: the baseline
 value for the pollutants should be zero.

29 ///

1 The Court finds that BLM has provided a sufficient explanation for its use of zero as the
2 baseline value for the pollutants. As BLM explained, the Project is located in a rural area that has
3 no development or major roads and does not have a monitoring station. AR066375. Because of
4 the lack of site-specific data, the Bureau of Air Pollution Control was contacted, who suggested
5 zero as the background concentrations for the pollutants. *Id.* In addition, BLM and Air Sciences
6 looked at representative sites to obtain baseline values. AR066375–84. Given the rural nature of
7 the Project, BLM identified monitoring stations that could be considered “rural.” Only four
8 monitoring stations in Nevada are located relatively far away from major population centers and
9 could be considered rural. AR066380. But those stations, unlike the Project area, are influenced
10 by urban activities, traffic, and power plant emissions, making them unrepresentative of rural
11 settings. *Id.*

12 The lack of helpful Nevada specific data led BLM to assess monitoring stations in nearby
13 states, AR066381, resulting in BLM looking at Yosemite and White Mountain specifically,
14 AR066383. Based on its review of the data from those monitoring stations, along with the
15 guidance from NDEP, the BLM concluded that it is reasonably justified to use a zero-baseline
16 concentration for CO, NO₂, and SO₂ in the Project area. Moreover, the EPA trends data showed
17 that concentrations of CO and NO₂ decreased significantly in the California/Nevada area.
18 AR066384.

19 Based on this record, the Court is satisfied that BLM took a “hard look” at the baseline
20 values for CO, NO₂, and SO₂, and adequately explained its reasoning for using zero as the baseline
21 level. BLM was not required to obtain site-specific data to satisfy NEPA. And its review presented
22 a thorough discussion explaining how it reached its decision to use zero as the baseline value and
23 why that was consistent with the rural nature of the Project. Thus, BLM did not violate NEPA
24 when reviewing the baseline values for pollutants.

25 2. Cumulative Impacts

26 Plaintiffs next argue that BLM failed to consider the cumulative impacts of oil and gas
27 development to the air and water. NEPA requires BLM to consider all cumulative impacts, i.e.,
28

1 the impact[s] on the environment which result[] from the incremental impact of the
 2 action when added to other past, present, and reasonably foreseeable future actions
 3 regardless of what agency (Federal or non-Federal) or person undertakes such other
 4 actions. Cumulative impacts can result from individually minor but collectively
 5 significant actions taking place over a period of time.

6 40 C.F.R. § 1508.7. “Reasonably foreseeable future actions” are “those Federal or non-Federal
 7 activities not yet undertaken, for which there are existing decisions, funding, or identified
 8 proposals.” 36 C.F.R. § 220.3. “Although ‘projects need not be finalized before they are
 9 reasonably foreseeable,’ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078–
 10 79 (9th Cir. 2011), they must be more than merely ‘contemplated.’ *Kleppe v. Sierra Club*, 427
 11 U.S. 390, 410 n.20 (1976).” *League of Wilderness Defs./Blue Mountains Biodiversity Project v.*
 12 *Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014). This standard requires BLM to provide “a
 13 sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis
 14 about how these projects, and differences between the projects, are thought to have impacted the
 15 environment.” *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 603
 16 (9th Cir. 2010).

17 In the previous litigation, the Ninth Circuit found BLM’s cumulative air impacts analysis
 18 deficient. The court explained that “BLM made no attempt to quantify the cumulative air impacts
 19 of the Project together with the Ruby Hill Mine and vehicle emissions. Nor did the BLM attempt
 20 to quantify or discuss in any detail the effects of other activities, such as oil and gas development,
 21 that are identified elsewhere in the Final Environmental Impact Statement (“FEIS”) as potentially
 22 affecting air resources.” *Great Basin*, 844 F.3d at 1105.

23 On remand, BLM included the Ruby Hill Project, the Gold Bar Project, and the reasonably
 24 foreseeable future action of the Prospect Mountain Mine Project in its cumulative impacts analysis
 25 for air resources. AR066150–51. BLM also confirmed that there are no gas developments within
 26 the cumulative effects study area (“CESA”) and explained that “vehicular emissions are generally
 27 included in background concentrations and are not specifically included in air models for NEPA
 28 analysis.” AR066150.

29 ///

30 ///

1 Plaintiffs now primarily take issue with BLM’s analysis regarding cumulative impacts of
 2 oil and gas development on air and water.⁸ Specifically, Plaintiffs argue that BLM should have
 3 considered the cumulative impacts on air quality identified within BLM’s Environmental
 4 Assessment for its July 2019 Oil and Gas Lease Sale (“2019 Lease Sale EA”).⁹ This EA “ma[d]e
 5 some general assumptions about what type of activities could occur on oil and gas leases, and
 6 provide[d] general analysis of potential impacts associated with those types of activities.” ECF
 7 No. 50-12 at 4–5. And it estimated that twenty-five wells would be drilled and 65–100 acres of
 8 surface disturbance associated with potential oil and gas exploration and production activities
 9 could be expected to occur in the [Battle Mountain] District” within the next ten years. *Id.* at 5.

10 This Court’s review of BLM’s analysis regarding reasonably foreseeable future actions is
 11 governed by a rule of reason standard, which is highly deferential to BLM to determine what the
 12 proper scope of the EIS is, *Or. Nat. Res. Council*, 109 F.3d at 526, and the Court must uphold
 13 BLM’s decision if it is supported by a reasonable explanation, *Indep. Acceptance Co.*, 204 F.3d at
 14 1251. Under this standard, the Court agrees with the Defendants that BLM did not act arbitrarily
 15 and capriciously by not considering the 2019 Lease Sale EA and potential oil and gas
 16 developments.

17 Here, BLM made a reasonable decision to not include potential oil and gas developments
 18 in its cumulative impacts analysis considering that there are currently no oil and gas developments
 19 in the CESA and no applications for permits to drill. As BLM explained in its response to public
 20 comments,

21 [t]he BLM confirmed, through the lack of any Applications for Permit to Drill since
 22 2012, that there were no oil and gas developments within the Air Quality CESA.
 23 The lack of Applications for Permit to Drill leads the agency to conclude that it is
 24 unlikely that oil and gas development will occur within the Air Quality CESA in
 25 the future. Although the 2012 Final EIS stated there was a moderate to high
 26 potential for oil and gas development, the BLM has now revised its opinion to

27 ⁸ Plaintiffs briefly argue that the only reasonably foreseeable future action BLM considered was the Prospect Mountain
 28 Mine. Plaintiffs are correct that the Prospect Mountain Mine is the only reasonably foreseeable mining project that
 BLM considered. However, Plaintiffs fail to identify any other project that BLM should have considered and focus
 instead on potential oil and gas development.

⁹ The Environmental Protection Agency identified this EA in its September 23, 2019, letter addressing concerns about
 the FSEIS for the Project. AR066756. This EA was completed by the same office that approved the Mount Hope
 Project.

1 conclude that there is a low probability and thus the BLM did not include such in
 2 the revised air quality modeling for the Final SEIS.

3 AR066206. Moreover, no oil and gas projects have been proposed, and as BLM explained it
 4 appears unlikely that any will be considering the lack of applications within the last ten years. At
 5 this point, BLM's consideration of oil and gas development would be speculative and premature.
 6 NEPA does not require BLM to conduct such analysis.

7 Thus, the Court finds that BLM's consideration of the cumulative impacts of oil and gas
 8 development on air quality satisfies NEPA. For the same reasons, the Court finds that BLM
 9 satisfied the NEPA requirements for analysis regarding the cumulative impacts of oil and gas
 development on water.

10 3. Mitigation Measures

11 Plaintiffs' last NEPA allegation is that BLM failed to adequately analyze mitigation and
 12 related impacts to surface and ground water quantity.

13 NEPA requires an EIS to "include appropriate mitigation measures not already included in
 14 the proposed action or alternatives," 40 C.F.R. § 1502.14(f), and to "include discussions
 15 of... [m]eans to mitigate adverse environmental impacts (if not fully covered under
 16 § 1502.14(f)," 40 C.F.R. § 1502.16(h). The EIS must contain "a reasonably complete discussion
 17 of possible mitigation measures" to avoid "undermin[ing] the 'action-forcing' function of NEPA."
 18 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). But a complete
 19 mitigation plan does not have to be actually formulated and adopted. *Id.*; *South Fork Band Council*
 20 of *W. Shoshone of Nev. v. U.S. Dep't. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009). It is essential
 21 that the mitigation plan contain "at least *some* evaluation of effectiveness." *Id.*

22 The mitigation measures addressed in the 2012 FEIS, from which the 2019 FSEIS is tiered,
 23 include site-specific mitigation strategies for surface water and ground water resources that
 24 addressed how much each spring or stream's flow would be reduced and how the water would be
 25 replaced. AR068927–40; AR068941–51; AR068962. As the 2012 FEIS explained, the
 26 replacement water needed "would at least initially come from EML's existing water rights if
 27 additional water rights have not yet been secured." AR068924. The 2012 FEIS also discussed
 28

1 what monitoring measures and mitigation triggers were associated with each spring and stream, as
 2 well as the effectiveness of each site-specific mitigation plan. *Id.*; AR068923–25.

3 During the first round of litigation, the Ninth Circuit noted that “the analysis of ground
 4 water pumping in the FEIS does *not* take into account the roughly 200 gallons per minute needed
 5 to replace depleted spring and stream water—that error appears to be quite small, raising questions
 6 about whether it might be harmless.” *Great Basin*, 844 F.3d at 1110. The court determined that
 7 it was roughly a three percent error. *Id.* n.9. Because none of the parties briefed harmlessness,
 8 and the disposition of the appeal did not depend on the resolution of this issue, the Court declined
 9 to reach it. *Id.* at 1111.

10 Now, Defendants assert that the failure to account for the replacement water is harmless
 11 error. When an agency fails to comply with NEPA, the harmless error analysis requires the Court
 12 to analyze “whether the error caused the agency not to be fully aware of the environmental
 13 consequences of the proposed action, thereby precluding informed decisionmaking and public
 14 participation, or otherwise materially affected the substance of the agency’s decision.” *Idaho Wool*
 15 *Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016). “In the context of agency review,
 16 the role of harmless error is constrained. The doctrine may be employed only when a mistake of
 17 the administrative body is one that clearly had no bearing on the procedure used or the substance
 18 of the decision reached.” *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1090–91
 19 (9th Cir. 2011) (quotation omitted).

20 Plaintiffs allege that BLM’s failure to include the replacement water had a bearing on the
 21 substance of the decision reached by BLM. But the amount of water that the error amounts to is
 22 relatively minor to the overall mitigation plan. Moreover, Plaintiffs have not advanced any
 23 arguments supporting that BLM’s failure to consider that replacement water precluded informed
 24 decisionmaking and public participation. Overall, the mitigation plan is substantially complete,
 25 analyzing site-specific mitigation plans, the water quality of the replacement waters, and the
 26 effectiveness of the plan. Thus, the Court concludes that BLM did not violate NEPA.¹⁰

27 ¹⁰ Relying on their earlier arguments, Plaintiffs also cursorily claim that BLM failed to prepare or consider mitigation
 28 measures for the Project’s air pollution. But as explained above, the Court finds that BLM’s consideration of air
 quality and baseline conditions satisfied NEPA.

C. FLPMA

Plaintiffs allege that BLM violated FLPMA because it violated PWR 107 and NEPA, causing it to fail to prevent unnecessary or undue degradation of public resources. FLPMA requires BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands” before approving a project. 43 U.S.C. § 1732(b); 43 C.F.R. § 3809.411(d)(3)(iii). As explained above, the Court declines to reach Plaintiffs’ FLPMA claim as it relates to the PWR 107 lands. And the Court has found that BLM did not violate NEPA. Because Plaintiffs’ FLPMA claim depends upon their success on the NEPA claim, their FLPMA claim necessarily fails.

D. Reclamation Costs and Financial Assurances

Lastly, Plaintiffs allege that BLM's authorization of the Project was improper because BLM did not require a reclamation cost estimate or reclamation bond for approved right of ways prior to approving the Project, and BLM did not require a long-term funding mechanism ("LTFM") as a condition of approval.

BLM's regulations require that all activities in the mining plan be covered by a financial guarantee that "must cover the estimated cost as if BLM were to contract with the third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards." 43 C.F.R. § 3809.552(a). The reclamation cost of determination is the amount of money that must be covered by the financial guarantee. 43 C.F.R. § 3809.554. "[S]urface disturbing activity cannot begin until the financial guarantee has been accepted and obligated by BLM." 43 C.F.R. § 3809.412.

Here, BLM stated in the 2019 Record of Decision that “EML will be required to provide a financial guarantee consistent with the Plans of Operations,” AR066835, and “EML will be required to provide a bond” in accordance with 43 C.F.R. § 2805.20(a) and (3). Plaintiffs primarily take issue with these statements because BLM, unlike in 2012, did not provide the reclamation cost estimate or determine the reclamation costs for the approved right of ways in the Record of Decision.

111

1 The Court agrees with BLM that the governing regulations do not specify when such a
2 determination must be made. Although it must be made before operations begin, nothing within
3 the regulations require a reclamation cost estimate or a reclamation bond for approved right of
4 ways prior to approval of a project. Seeming to recognize this, Plaintiffs attempt to rely on a BLM
5 internal policy that requires the decision to state the estimated reclamation cost determination and
6 the financial guarantee amount. BLM Surface Management Handbook H-3809-1, at 4-45.
7 Although this policy does support Plaintiffs' position, BLM's internal policies are not legally
8 binding. *McMaster v. United States*, 731 F.3d 881, 888-89 (9th Cir. 2013). Thus, it was not
9 improper for BLM to issue the Record of Decision without including the reclamation cost estimate
10 or a reclamation bond for the right of ways.

11 Similarly, Plaintiffs' argument about the necessity of a LTFM fail. BLM did determine
12 that "a LTFM will be required for post-reclamation obligations (including long-term monitoring
13 and mitigation) associated with the closure process of the Mount Hope Project." AR066835. But
14 BLM's regulations give BLM the discretion to require a trust fund or other long term funding
15 mechanism, and do not specific when it must be established. 43 C.F.R. § 3809.552(c).

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' motion for summary judgment (ECF No. 57) is granted in part and denied in part.

IT IS FURTHER ORDERED that the Defendants' cross-motions for summary judgment (ECF Nos. 68 and 69) are granted in part and denied in part.

IT IS FURTHER ORDERED that the Federal Defendants' motion for leave to file a response to ECF No. 89 (ECF No. 90) is granted.

IT IS FURTHER ORDERED that the BLM's 2019 Record of Decision is vacated and remanded to the BLM.

IT IS FURTHER ORDERED that the Clerk of the Court shall accordingly enter judgment and close this case.

IT IS SO ORDERED.

DATED this 31st day of March, 2023.


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE